

April 29, 2019

VIA ECFS

Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: Notice of Ex Parte Presentation, In the Matter of Consumer and Governmental Affairs Bureau Seeks Comment on Interpretation of the Telephone Consumer Protection Act in Light of the D.C. Circuit's ACA International Decision, CG Docket No. 18-152; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278.

Dear Ms. Dortch:

The Student Loan Servicing Alliance; Navient Solutions, LLC; Nelnet Servicing, LLC; and the Pennsylvania Higher Education Assistance Agency (collectively "Student Loan Servicers") write in support of the "U.S. Government's legal opinion," recently articulated by Secretary of Commerce Wilbur Ross, that government contractors acting under validly conferred authority are not "persons" for purposes of the Telephone Consumer Protection Act ("TCPA").¹

The Letter bolsters comments by the Student Loan Servicers, as well as numerous others, that the Federal Communications Commission ("Commission"), in its *Broadnet Order*, correctly interpreted the definition of "persons" as used in the TCPA and the Communications Act.² The U.S. Government relies on contractors and other agents to fulfill a multitude of public interest

¹ Letter from Secretary of Commerce Wilbur Ross, United States Department of Commerce, to Chairman Ajit Pai, FCC, CG Docket Nos. 18-152, 02-278 at 4 (filed April, 4, 2019) ("Letter").

² Comments of the Student Loan Servicing Alliance; Navient Corp.; Nelnet Servicing, LLC; and Pennsylvania Higher Education Assistance Agency, CG Docket Nos. 18-152, 02-278 (filed June 13, 2018) ("June 13th Comments"); Reply Comments of the Student Loan Servicing Alliance; Navient Corp.; Nelnet Servicing, LLC; and Pennsylvania Higher Education Assistance Agency, CG Docket Nos. 18-152, 02-278 (filed June 28, 2018) ("June 28th Comments"); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Broadnet Teleservices LLC Petition for Declaratory Ruling*, CG Docket No. 02-278, Declaratory Ruling, 31 FCC Rcd. 7396 (July 5, 2016) ("Broadnet Order").

benefits. Reversing the *Broadnet Order* will do more than just prevent the Commerce Department from fully deploying the decennial Census; among other harms, it could hinder time-sensitive health-related surveys conducted to help address intimate partner violence and limit the ability of servicers to ensure that borrowers do not default on their federal student loans.³ The Student Loan Servicers urge the FCC to protect the flexibility Congress afforded the FCC's sister agencies under the TCPA to provide services and interact with constituents, and affirm the *Broadnet Order*.

The U.S. Government's Analysis Confirms That Government Contractors Are Not "Persons" Under the TCPA

The Letter explains that a government contractor, acting on validly conferred authority and as directed, is insulated from TCPA liability "because its conduct is *lawful*."⁴ Callers act lawfully because the government may delegate to its contractors its privilege to lawfully make calls that the TCPA would otherwise proscribe.⁵

No one disputes that the government is not a "person" under the TCPA and thus is privileged to lawfully make such calls. The privilege may be delegated. Relying on the U.S. Government's *amicus* brief to the Supreme Court in *Campbell-Ewald v. Gomez*, the Letter explains that:

Because the TCPA's prohibitions do not apply to federal agencies, those agencies possess a privilege to engage in conduct that private parties are forbidden to undertake. Ordinarily such 'privileges are delegable,' *i.e.*, the privilege holder can lawfully authorize another to perform the privileged act on the holder's behalf. Whether a 'privilege[] created by statute' is delegable or must be 'exercised personally' is ultimately a question of statutory construction.⁶

The U.S. Government concludes that the Commission's interpretation of the term "person" in the *Broadnet Order* to exclude private contractors was "thorough and correct" and that there is no "legal basis" to reverse course.⁷ We agree. The Commission's analysis in the *Broadnet Order* is well-founded and reflects a close reading of the TCPA and the Communications Act in light of common law principles that preclude liability for companies acting under validly conferred authority.

³ See, e.g., Comments of RTI International, CG Docket Nos. 18-152, 02-278 at 2 (filed June 13, 2018) (noting that RTI has conducted intimate partner violence surveys on behalf of the federal government and that not allowing the government and its contractors to call wireless numbers "would hinder the government's ability to address the issue of intimate partner violence"); see also June 13th Comments.

⁴ See Letter at 2 (quoting Brief for the United States as *Amicus Curiae* Supporting Respondent at 29, *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016) (No. 14-857) (emphasis in original) ("*Amicus* Brief")).

⁵ *Amicus* Brief at 24 ("Federal agencies may conclude that the performance of particular governmental functions warrants making calls that, if made by a private person, would violate the TCPA.")

⁶ Letter at 2 (quoting *Amicus* Brief at 24 (citations omitted)).

⁷ Letter at 3.

The Government's Analysis Fully Refutes Criticisms of the *Broadnet Order*

The U.S. Government's legal analysis puts to rest objections to the Commission's *Broadnet Order*.

The Letter refutes a central criticism of the *Broadnet Order* that contractors are entities that are specifically listed in the definition of "persons" in section 3(39) of the Communications Act and therefore bound by the TCPA.⁸ As Secretary Ross explains, the definition of person under Section 3 applies "'unless the context otherwise requires.'"⁹ The context here is straightforward. The government simply cannot fulfill its mandated public service functions without the assistance of contractors. Its calls are lawful, and it may delegate this privilege to contractors. The U.S. Government's delegation of the privilege is best effectuated in the TCPA by excluding contractors from the definition of a "person," notwithstanding that they may also be corporations or partnerships.¹⁰ The Letter leaves no doubt that this is the legally appropriate and compelled conclusion not only based on the statutory construction and intent behind the TCPA, but also because reversing *Broadnet* "would have a devastating impact on Federal agencies that use contractors to complete critical missions."¹¹

Another objection raised to the *Broadnet Order* is that contractor immunity is a matter of common law for which the Commission has no particular expertise and therefore its application should be left to the courts. But the U.S. Government's analysis confirms that the scope of contractor liability is a matter of statutory interpretation of the TCPA: "Whether a 'privilege[] created by statute is delegable ... is ultimately a question of statutory construction.'"¹² As the government's *amicus* brief states, the government may make automated calls for various purposes without regard to the TCPA, such as collecting census data, and the TCPA "*need not be read to prohibit the government from directing private contractors to make such calls on its behalf.*"¹³ The U.S. Government thus instructs that the question of contractor liability is not primarily directed at the common law of agency, but to the interpretation of a statute, the TCPA. Congress has authorized the Commission to interpret the TCPA and its interpretations lie well within the Commission's deference-afforded competence. The U.S. Government in fact stated its expectation that the Commission would resolve the question of government contractor TCPA liability, citing petitions for declaratory ruling filed by RTI International and the National Employment Network Association that were decided in the *Broadnet Order*.¹⁴

⁸ Letter at 2-3.

⁹ Letter at 2-3 (citations omitted).

¹⁰ Letter at 2-3.

¹¹ Letter at 3.

¹² *Amicus* Brief at 24.

¹³ *Amicus* Brief at 24 (emphasis added).

¹⁴ *Amicus* Brief at 31 (noting that the FCC "is currently considering requests to clarify that a federal agency (e.g., the Census Bureau) may utilize private contractors to make calls on behalf of the agency") (citing *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Expedited Declaratory Ruling Filed by RTI International*, Public Notice, 29 FCC Rcd 13916, 13916-17 (2014); and *Consumer and Governmental Affairs Bureau*

The Letter's focus on the Census Bureau and other Federal agencies also undermines the argument that Congress's specific exemption for entities that collect federally owned or guaranteed debt would not be necessary if Congress believed contractors were not persons. As the Student Loan Servicers' comments explained, the federal debt collection exemption extends beyond federal contractors. Companies seeking to collect private debts guaranteed by the government may not be under contract with the government, but Congress found that they too should be exempt from liability in order to minimize the financial impact to the government due to default on such loans.¹⁵ The federal debt collection exemption in no way evidences a Congressional view that the statutory definition of persons in the TCPA must include federal contractors.

Moreover, the Fourth Circuit's recent decision to strike the government debt exemption on constitutional grounds heightens the urgency to preserve the *Broadnet Order*.¹⁶ The court's suggestion that the government could make the calls itself ignores the practical difficulties of contacting the many millions of persons with whom the government has important business to conduct, from preforming the Census, to surveys, to calling government borrowers.¹⁷ The government simply cannot carry out its vital business without the use of government contractors.

Validly Conferred Authority and Compliance with Government Directions Are the Key Determinants of Whether a Caller is Acting Pursuant to a Delegated Privilege

As explained below, although some courts have exempted government contractors from liability on a colloquial use of the term "immunity," their analysis conceptually relies on privilege, which is evidenced by the courts' determinations that the contractor had complied with validly conferred authority to act on the government's behalf.¹⁸ The Commission should not be deterred from upholding the *Broadnet Order* based on some courts' failures to differentiate between immunity and privilege, particularly when the practical application of this difference would have such a devastating effect on the U.S. Census and other vital government functions.

In its *amicus* brief, the government draws a distinction between "immunity," which affords protection from liability for wrongful acts, and privilege, "which serves to *legitimize* the conduct of the privilege-holder or his appropriate delegee."¹⁹ As indicated above, the concept of privilege underpins the government's legal conclusion that government contractors are not "persons" for purposes of the TCPA. Courts often utilize some variation of the term immunity, such as qualified immunity or derivative immunity or *Yearsly* immunity,²⁰ in concluding that contractors are not

Seeks Comment on Petition for Expedited Declaratory Ruling Filed by National Employment Network Association, Public Notice, 29 FCC Rcd 11268, 11268 (2014)).

¹⁵ June 13th Comments at 7-8.

¹⁶ *American Ass. of Political Consultants, Inc. v. Federal Communications Commission*, No. 18-1588 (4th Cir. Apr. 24, 2019).

¹⁷ *Id.*, slip op. at 19-20, n. 10.

¹⁸ *Amicus* Brief at 27-29.

¹⁹ *Amicus* Brief at 25 (emphasis in original).

²⁰ *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940).

subject to TCPA liability. Despite the use of different terms, the ultimate test stated for avoiding liability is the same: whether the government contractor is acting under “authority validly conferred” and acts as directed by the government.²¹ In their reply comments, for example, the Student Loan Servicers described the Fourth Circuit’s decision in *Cunningham v. General Dynamics Information Technology, Inc.* 888 F.3d 640 (4th Cir. 2018), which spoke in terms of immunity, but rested its finding that the contractor was not liable based on validly conferred authority.²² The government’s *amicus* brief notes that courts may sometimes utilize the term “immunity” colloquially and at times interchangeably with “privilege.”²³

The Letter notes that there is no inconsistency between the government’s position in its *amicus* brief and the *Broadnet Order*, which speaks in terms of both immunity and privilege and concludes that contractors may invoke the government’s exception from liability (*i.e.*, the government’s privilege) when they have been validly authorized to act.²⁴ The Student Loan Servicers agree and would discourage the FCC from potentially derailing the accurate and complete enumeration of the U.S. population next year based on this semantic distinction.

The Commission should follow the Commerce Department’s legal opinion and confirm that private contractors acting under validly conferred authority and consistent with the government’s directions are not “persons” for purposes of the TCPA.

Calling Parties Need a Clear Interpretation of Automatic Telephone Dialing System that is Consistent with the Congress’s Legislative Intent in Adopting the TCPA

Finally, the Student Loan Servicers agree with Secretary Ross that federal contractors (and all calling parties in general) do not violate the TCPA unless and until they use equipment to randomly or sequentially generate telephone numbers to be called.

As noted in the Letter, the Census Bureau will not use an automatic telephone dialing system (an “ATDS” or “autodialer”), as defined in the TCPA, to call Census respondents. The Census Bureau and its contractors “will use live call agents to call specific numbers provided by respondents to the Census Bureau staff.”²⁵ The Census Bureau’s (and its contractors’) call process should fall outside of the scope of the TCPA, which imposes restrictions on, *inter alia*, calls placed using “equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”²⁶

Unfortunately, the scope of equipment that qualifies as an ATDS remains the subject of uncertainty and attendant litigation—particularly in the wake of the D.C. Circuit Court’s decision

²¹ *Amicus* Brief at 28-29.

²² June 28th Comments at 4-7.

²³ *Amicus* Brief at n. 11.

²⁴ Letter at 2.

²⁵ Letter at 4.

²⁶ See 47 U.S.C. §227(a)(1).

in *ACA International*.²⁷ The Student Loan Servicers encourage the FCC to clarify that equipment qualifies as an ATDS only if it possesses the functions expressly included in the statutory definition of ATDS, and that callers only be subject to the ATDS restrictions when such functions are actually used to make a call.²⁸ This interpretation best balances Congress's intent to protect consumers by restricting and requiring consent for "scattershot" automatic dialing while supporting the ability of good-faith callers to place time-sensitive calls to consumers.²⁹

Respectfully submitted,

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²⁷ See, e.g., *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041 (9th Cir. 2018).

²⁸ See Comments of the Student Loan Servicing Alliance; Navient Corp.; Nelnet Servicing, LLC; and Pennsylvania Higher Education Assistance Agency, CG Docket Nos. 18-152, 02-278 (filed Oct. 17, 2018) ("October 17th Comments"); Reply Comments of the Student Loan Servicing Alliance; Navient Corp.; Nelnet Servicing, LLC; and Pennsylvania Higher Education Assistance Agency, CG Docket Nos. 18-152, 02-278 (filed Oct. 24, 2018).

²⁹ See October 17th Comments at 3.